

124 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Williston Basin Interstate Pipeline Company

Docket No. CP08-184-000

DECLARATORY ORDER ON SCOPE
OF COMMISSION JURISDICTION

(Issued July 18, 2008)

1. On April 24, 2008, Williston Basin Interstate Pipeline Company (Williston) filed a petition for a declaratory order seeking clarification concerning the scope of the Commission's jurisdiction under the Natural Gas Act (NGA) and Williston's certificate authority under section 7(h) of that Act to acquire, by the exercise of eminent domain, native gas for use as cushion gas for its Elk Basin Storage Reservoir, a natural gas underground storage facility.¹ For the reasons discussed below, the Commission declares that with respect to a storage facility certificated under NGA section 7, the certificate holder may acquire through the exercise of eminent domain the right to native gas within the storage facility's certificated horizontal and vertical boundaries to the extent necessary to ensure the initial and continued proper operation of the facility.

Background

2. In 1949, the Commission granted Billings Gas Company NGA section 7 certificate authorization to acquire a depleted oil and gas production field straddling the Wyoming and Montana border to develop an underground storage facility.² The Commission's

¹ Cushion gas is the volume of gas needed as a permanent inventory to maintain adequate pressure to enable gas to be withdrawn from an underground storage reservoir. Cushion gas is typically composed of both native gas, i.e., gas that has never been withdrawn from the ground, and base gas, i.e., gas that has already been produced that is injected into the storage reservoir during the development of the storage facility.

² *Billings Gas Company (Billings)*, 8 FPC 1166 (1949). Williston takes the position that the size of the underground reservoir has not changed since Elk Basin's 1949 authorization, but that the 1949 order's description of the boundaries of the underground reservoir understated the actual geologic reach of the reservoir;

(continued...)

certificate order stated that the estimated total capital cost of this Elk Basin Storage Reservoir facility included “the cost of rights to more than six billion cubic feet of gas still in place.”³ In 1951, Montana-Dakota Utilities Company acquired Billings Gas Company,⁴ and in 1985, Williston acquired Montana-Dakota Utilities Company.⁵

3. In a 1991 order, the Commission considered the characteristics of Williston’s Elk Basin Storage Reservoir and found that it (1) was not operated as a traditional summer injection/winter withdrawal cycle facility, but served as a warehouse for long-term storage, with gas injected to be stored indefinitely; (2) was used principally to satisfy Williston’s own system’s requirements and offered comparatively little cyclic storage service for third parties; and (3) lacked extensive above-ground gathering, dehydration, and compression facilities and, consequently, had a disproportionately high cushion gas/working gas ratio. The Commission concluded that in view of the field’s operational history and geological characteristics, “it is difficult to assign specific traditional cyclic cushion and working gas volumes” to the Elk Basin facility.⁶ Williston states that its Elk Basin facility’s cushion gas includes more than 6 Bcf of native gas.

4. The Elk Basin storage facility lies within one formation, the Cloverly Formation, and is located within an active production field. Williston believes that wells outside the

consequently, from the outset, part of the native gas used by the storage facility as cushion gas has been located in portions of the reservoir that lie outside the certificated boundaries. Williston has submitted an application in Docket No. CP08-158-000 to enlarge Elk Basin’s boundaries, alleging the geologic boundaries of its storage reservoir extend beyond the reservoir’s certificated boundaries. This certificate application is pending before the Commission and issues related to the Williston’s storage facility’s boundaries will be addressed in a future order in this separately docketed proceeding.

³ *Id.* Williston states that rates for Elk Basin storage services have been designed to incorporate the cost (calculated at four cents per Mcf) of the residual native gas.

⁴ *Montana-Dakota Utilities Company and Billings Gas Company*, 10 FPC 1002 (1951).

⁵ *Williston Basin Interstate Pipeline Company and Montana-Dakota Utilities Co.*, 30 FERC ¶ 61,143 (1985).

⁶ *Id.* at 61,965

surface boundaries and below the vertical boundaries of its Elk Basin reservoir are extracting portions of its facility's cushion gas, and has sought to stop such production.⁷

5. In 2006, Williston filed a complaint in the United States District Court for the District of Montana, Billings Division, seeking to condemn wells near its storage reservoir on the grounds that their production was interfering with its storage operations. The court found that there does not "appear to be any statute or rule that allows [Williston] to let its own storage gas leave its reservoir, travel to another's property, and then become a basis for taking that property by injunction or condemnation." The court observed, in dismissing the complaint, that if it "were to exercise jurisdiction and entertain [Williston's] claims it would usurp the specialized role of FERC because it is the job of FERC to deal with these issues," and concluded that if Williston "needs to address the problems with the leaky underground storage reservoir, it falls within FERC's authority under the NGA."⁸

6. Williston appealed, and in 2008, the United States Court of Appeals for the Ninth Circuit affirmed the District court's decision, stating: "Allowing a natural gas company to condemn property beyond the scope of its [certificate of public convenience and necessity] whenever that property could be useful for the operation or maintenance of an existing facility would create a significant gap in FERC's oversight of new projects and acquisitions."⁹

7. In 2006, producers operating wells near Williston's storage facility sought a declaratory judgment from the District Court of Wyoming, Third Judicial District, Lincoln County, affirming their right to withdraw gas; Williston counterclaimed requesting an injunction to shut down production. In 2008, the court found in favor of the producers, determining that although Williston's cushion gas was being drawn out of the ground by producers, under Wyoming law, Williston cannot assert an ownership claim over native gas, or over injected gas that can no longer be identified as such due to commingling with native gas, or over injected gas that has escaped or migrated beyond the boundaries of the storage reservoir because those boundaries were not well defined or

⁷ Williston estimates that it has lost approximately 10 Bcf of cushion gas since other operators' production wells within the vicinity of its Elk Basin storage facility went into service in 2002.

⁸ *Williston v. An Exclusive Storage Leasehold*, slip op. 5-6, Cause No. CV 06-10-BLG-RFC (D. Mont., 2006).

⁹ *Williston v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1097 (9th Cir., 2008).

well maintained.¹⁰ The court noted that “absent a FERC certificate covering the formations currently producing from the wells,” “the application of state law, such as the ‘Rule of Capture,’” is not “in any way preempted by the NGA.”¹¹

8. In view of these decisions, Williston asks the Commission to specify the scope of its NGA jurisdiction and how that jurisdiction impacts Williston’s capability to obtain the rights to cushion gas needed for the operation of its Elk Basin facility by means of eminent domain court proceedings.¹²

9. Williston believes the Commission’s authorization for the Elk Basin Storage Reservoir conferred upon the certificate holder property rights to gas, including both native gas and injected gas, used as cushion gas.¹³ Williston consequently views any withdrawal and diversion of Elk Basin cushion gas as a *de facto* abandonment of gas dedicated to NGA-jurisdictional interstate transportation service. Williston insists that all gas that functions as its facility’s cushion gas is dedicated to interstate service, regardless of whether such gas is inside or out of the certificated boundaries of its storage

¹⁰ *Howell Petroleum Corporation v. Williston v. Anadarko Petroleum Corporation*, Civil Action No. 24024 (3rd Jud. Dist. Wyo., 2008).

¹¹ *Id.* at 41-42. See *ANR Pipeline Company*, 76 FERC ¶ 61,263, at 62, 347, n. 6 (1996) and *Williams Natural Gas Company*, 77 FERC ¶ 61,150, at 61, 591, n. 11 (1996), in which the Commission defers to state law to determine rights with respect to gas in the ground.

¹² In its petition and its answer, Williston describes its certificate authorization as conveying “the right to acquire and own the rights to cushion gas.” We note NGA section 7(h) states that a certificate holder may “acquire . . . by the exercise of the right of eminent domain” all “necessary land or other property.” The actual transfer of ownership rights, and the compensation for the ceded property rights, are established in a court proceeding. Consequently, we characterize what Williston describes as its “right to acquire and own the rights to cushion gas” as Williston’s “right to acquire the rights to cushion gas.”

¹³ As explained above, Williston takes the position that all native gas in the reservoir in which their gas is stored, regardless whether the native gas is within the reservoir’s certificated boundaries, is NGA jurisdictional to the extent it functions as cushion gas for the certificated storage operations. Therefore, Williston further argues any gas injected into the facility is also subject to NGA jurisdiction by virtue of commingling with the native gas, even if injected gas migrates beyond the reservoir’s certificated boundaries. Citing *California v. Lo-Vaca Gathering Company*, 379 U.S. 366 (1965).

reservoir, and that such gas is “a part of the facilities” subject to the Commission’s jurisdiction. Williston requests the Commission affirm this description of its cushion gas, and declare that state laws that could conflict with the exercise of NGA jurisdiction over cushion gas – *e.g.*, potentially, state property laws that preclude ownership of native gas – are preempted.

Notice, Interventions, and Comments

10. Notice of Williston’s request for a declaratory order was published in the *Federal Register* on May 8, 2008.¹⁴ Timely motions to intervene were submitted by Howell Petroleum Corporation (Howell)¹⁵ and by Encore Acquisition Company jointly with Encore Energy Partners Operating LLC (collectively, Encore).¹⁶ Untimely comments were submitted by E.E. Lonabaugh, who submitted the same comments in Docket No. CP08-158-000. The comments raise issues relevant to that separate proceeding, but not to this proceeding; therefore, we will not accept and respond to those comments here.

Motion for Evidentiary Hearing

11. Encore requests the Commission initiate a full evidentiary hearing to address issues related to expanding the certificated boundaries of Williston’s storage facility. An evidentiary trial-type hearing is necessary only where material issues of fact are in dispute that cannot be resolved on the basis of the written record.¹⁷ The issues identified by Encore are under consideration in the pending proceeding in Docket No. CP08-158-000. However, in the instant proceeding, we are not asked to alter the storage facility’s boundaries, but only to describe the extent to which Williston may employ eminent domain to seek to acquire rights to cushion gas needed to operate its storage facility. We find that the issues relevant to our determination in this proceeding can be resolved on the basis of the existing record. Accordingly, we find no need for a full evidentiary hearing.

¹⁴ 73 Fed. Reg. 26096 (2008).

¹⁵ Howell, a subsidiary of Anadarko Petroleum Corporation, is engaged in oil and gas exploration and production. Howell owns the mineral rights to acreage outside the surface boundaries of the Elk Basin Storage Reservoir as well as below the vertical boundaries of the storage facility.

¹⁶ Timely, unopposed motions to intervene are granted by Rule 214.218 of the Commission’s Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2008).

¹⁷ *See, e.g., Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); and *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

Protests, Answers, and the Commission Response

12. Protests to Williston's petition were submitted by Howell, Encore, and James B. Wilson. Williston submitted an answer to Howell's protest, to which Howell submitted a reply, to which Williston responded, to which Howell replied. Howell urges that we reject Williston's answer to its protest, claiming that Williston's answer presents arguments for the first time, and thus constitutes an amendment to its original petition. We view Williston's answer as a more detailed restatement, rather than a revision, of the request and rationale presented in its original petition. Further, admitting Williston's answer will not unfairly prejudice any party or cause undue delay. While section 385.213(a)(2) of our Rules of Practice and Procedure does not permit answers to protests or answers to answers, we may waive this rule for good cause shown. We do so in this instance to help clarify the issues under consideration.

James B. Wilson

13. Mr. Wilson states his family holds a mineral lease on property near the Elk Basin storage facility and obtains revenue from gas and oil produced from that property. Mr. Wilson emphasizes that there is a pending proceeding in a Wyoming court to determine the ownership of gas produced from land outside the Elk Basin facility's boundaries, and asks the Commission to withhold any decision on Williston's petition until the conclusion of the ongoing judicial proceeding.

Commission Response

14. We will not delay issuing this order, because this order should not unfairly prejudice the outcome of any other ongoing judicial proceeding. Indeed, issuance of this order is appropriate to clarify the scope of NGA section 7(h) and operation of that section's provision for the invocation of eminent domain in connection with certificate authorizations granted by the Commission.

Encore

15. Encore does not believe Williston has presented engineering and geologic data sufficient to show that its underground reservoir now extends beyond its certificated boundaries. If Williston does make such a showing, Encore argues the Commission should weigh the benefit to Williston of expanding the Elk Basin storage facility's certificated boundaries against the harm of depriving the public of the oil and gas production that would be lost as a result. Encore argues that the Commission should not take any action that would make it possible for Williston to exercise eminent domain to acquire additional property unless other, less intrusive options are exhausted.

Commission Response

16. Encore's protest describes, in a nutshell, the competing issues before us in the separate Williston certificate proceeding in Docket No. CP08-158-000. We decline to address these issues here, since they will be thoroughly reviewed and balanced in the certificate proceeding, and consequently reject Encore's protest. In this proceeding we do not alter Williston's existing certificate authority, or expand that authority to acquire additional property rights by the exercise of eminent domain.

Howell

17. Howell states that in authorizing Elk Basin in 1949, the Commission specified lateral and vertical boundaries, which Williston acknowledges its facility currently exceeds.¹⁸ Howell contends that the 1949 order left "a large part" of the underground reservoir outside the designated boundaries of the storage facility. Howell therefore concludes that this is not a case of gas migrating from an established reservoir, because "large portions" of the underground formation confining Elk Basin gas were, at the outset, beyond the storage facility's certificated boundaries. Howell contends "significant amounts" of native gas that have been represented by Williston to the Commission as being within the boundaries of the storage facility have never been confined within the certificated storage area. Howell further asserts that during the 1980s, Williston doubled the operating pressure of its storage field, thereby causing a breach in the Cloverly formation (which is within the boundaries of the underground reservoir) that established communication with the Sundance formation (which is below the vertical boundaries of Williston's certificated storage reservoir) through mechanical pathways associated with well bores that predate the 1949 conversion of the reservoir to storage.

18. Howell faults Williston for not describing state and federal court proceedings¹⁹ that rejected Williston's claims for compensation for loss of cushion gas due to production outside of the lateral and vertical boundaries of its Elk Basin Storage Reservoir. Howell urges the Commission to follow the results of these proceedings and apply the "map rule," whereby gas found beyond the certificated boundaries of a storage facility is not subject to NGA jurisdiction, even if it is determined that such gas was

¹⁸ Howell quotes Williston's *Petition for a Declaratory Order* at 11: "[T]he actual physical dimensions of the storage reservoir have turned out to be larger than realized at the time of the original certificate applications . . . it is now clear that the physical dimensions are larger than the boundaries specified in the original certificate."

¹⁹ In particular, *Williston v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090 (2008).

originally located within the certificated boundaries of a storage facility, unless and until the storage operator obtains Commission authorization to expand the boundaries of the storage facility.²⁰

Williston's Answer to Howell

19. Williston disputes Howell's claim that previous court decisions bear on the facts in this proceeding, contending this constitutes a case of first impression. In particular, Williston distinguishes the "map rule" cases, stating these cases "concern only the scope of a *natural gas company's* rights to exercise eminent domain authority under Section 7(h) of the NGA. The scope of the *Commission's* regulatory authority under the Act was never at issue in those cases."²¹ Williston declares "there is a well-established division of authority between the Commission and the courts – the Commission declares what is necessary to the operation of the natural gas facility and the courts determine the payments required under state law to compensate property owners for the use of their property that is necessary to the operation of the facility."²² Williston insists that in the Ninth Circuit's decision in *Williston v. An Exclusive Gas Storage Leasehold*, "[t]he court did not purport to rule on the scope of the Commission's jurisdiction."²³

20. Williston stresses that it is not asking the Commission to reach a factual determination regarding either the accuracy of the Elk Basin's reservoir's designated boundaries or the movement of cushion gas.²⁴ Rather, Williston seeks a Commission

²⁰ Citing, e.g., *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 776 F.2d 125 (6th Cir. 1985).

²¹ Williston's *Answer to Howell* at 4 (June 2, 2008).

²² *Id.* at 5. We note this division of authority parallels that reflected in NGA section 7(h), whereby a certificate holder is authorized to "acquire . . . by the exercise of the right of eminent domain" all "necessary land or other property." However, the actual transfer of ownership rights, and the compensation for the ceded property rights, are established in a court proceeding.

²³ *Id.*

²⁴ Williston acknowledges "[t]hese factual issues will be resolved, to the extent necessary, either in the court litigation to determine payments between the parties, or in Docket No. CP08-154-000," and references the Commission's statement that "[t]o the extent that native gas subject to property law protection is affected by certificated services in the expanded area, the court would have authority to resolve the nature, extent, and responsibility for such damages." *ANR Pipeline Co.*, 86 FERC ¶ 61,245, at 61,882 (1999).

declaration clarifying that (1) jurisdictional cushion gas includes any native or injected gas outside the certificated storage area to the extent it supports certificated storage operations; and (2) the scope of its jurisdiction precludes cushion gas committed to interstate commerce from being produced and sold by a third party from wells drilled to draw from formations outside the lateral or vertical certificated boundaries of a storage facility, regardless of whether the cushion gas is within or outside these boundaries.

Howell's Answer to Williston

21. Howell does not recognize the distinction Williston posits between the Ninth Circuit's ruling on the right of a certificate holder to invoke eminent domain to condemn property interests and Williston's requested declaration on the scope of the Commission's NGA jurisdiction, since it is the Commission's jurisdiction that serves as the statutory basis for the right of the certificate holder to acquire property interests through the exercise of eminent domain. Howell contends the Ninth Circuit's decision involved the same facts and the same parties, and resolved the matter in favor of the producers. Howell insists a certificate holder can only invoke eminent domain over property interests located within boundaries specified in a Commission order. Howell maintains that any other approach would conflict with the Ninth Circuit's statement that the Commission's certificate regulations and policies, "which provide multiple layers of protection for landowners, are inconsistent with Williston's proposed interpretation of the NGA as allowing a natural gas company to condemn property for operations or maintenance purposes without having to obtain FERC approval."²⁵

22. NGA section 1(b) states that the Commission's NGA jurisdiction shall not apply to the production or gathering of natural gas. Howell claims that because it produces gas, the Commission lacks jurisdiction to act to impact its operations.²⁶

²⁵ Howell's *Answer to Williston* at 7, quoting *Williston v. An Exclusive Gas Storage Leasehold*, 524 F.3d at 1098. In the Ninth Circuit proceeding, Williston sought to acquire wells owned by third parties located outside the horizontal and vertical boundaries of its storage facility on the grounds that the wells were extracting Elk Basin cushion gas.

²⁶ *Id.* at 8, citing *Williston v. An Exclusive Gas Storage Leasehold*, 524 F.3d at 1101-02, citing *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 509-13 (1949), contending the holding in that case determined that NGA section 1(b) "preclude[s] FERC from regulating an activity excluded from the NGA under that provision, even when the activity would negatively impact a natural gas company's ability to fulfill its duties and obligations under the NGA."

Commission Response

23. There is an inherent uncertainty regarding the performance of an underground reservoir; its actual boundaries depend on characteristics that can generally be confirmed only after the facility has commenced operation. Thus, it is not unusual to find that when a storage facility commences operation, the initially designated boundaries of the underground reservoir do not sufficiently confine gas volumes as anticipated. Similarly, after years of reliable operation, the equilibrium of a previously stable storage reservoir can shift, due to varying causes, permitting gas that had been reliably confined to escape confinement. In such cases, to ensure the integrity of the storage reservoir and the efficient operation of the storage facility, we typically either revise a storage facility's boundaries to conform to the enlarged contours of the actual underground reservoir or alter the operating parameters of the storage facility to prevent gas from migrating beyond the facility's certificated boundaries.²⁷

24. Williston takes the position that in certifying the Elk Basin Storage Reservoir, the Commission afforded the reservoir's cushion gas the status of a certificated facility.²⁸ Williston argues that once Commission jurisdiction attaches to cushion gas volumes, this status is retained even if cushion gas volumes once were, or later are, found in areas outside the storage facility's boundaries. Williston seeks assurance that its certificate includes section 7(h) authority to acquire the right to the cushion gas necessary to operate its Elk Basin facility, regardless of whether that cushion gas lies within Elk Basin's certificated boundaries. Williston asks us to affirm that cushion gas is a component of a certificated facility and, therefore, that actions that would interfere with this component's role in enabling Williston to meet its certificated service obligations are subject to the Commission's jurisdiction.

²⁷ See, e.g., *Dominion Transmission, Inc. (Dominion)*, order denying reh'g, 100 FERC ¶ 61,168 (2002). In *Dominion*, we authorized an expansion of the certificated boundaries of one of Dominion's gas storage fields to include an additional 3,063 acres because the certificated boundaries of the storage reservoir had expanded over time, allowing cushion and working gas to migrate beyond the originally specified boundaries of the storage reservoir, resulting in storage gas being produced by nearby oil wells. Other remedies to prevent migration may include reducing a facility's operating pressure or recapturing and recycling storage gas. See, e.g., *Equitrans, L.P.*, 119 FERC ¶ 61,287 (2007), in which we set maximum inventory and pressure parameters at levels to ensure the integrity of storage reservoirs and minimize gas migration.

²⁸ Quoting the Commission's finding in *Consolidated Gas Supply Corporation*, 42 FPC 1008, 1010 (1969), that "cushion gas is a facility as that term is used in the Natural Gas Act."

25. Section 284.1 of the Commission's regulations defines the transportation of natural gas in interstate commerce subject to its jurisdiction to include the storage of natural gas in interstate commerce. Thus, for purposes of the NGA, when the Commission grants a natural gas company a certificate to use an underground geological formation to store gas and provide storage service, the certificate gives the company the right to acquire the requisite property interests – if necessary, in court “by the exercise of the right of eminent domain”²⁹ – in the geological formation to be used for the storage of gas, as well as other property interests, including those needed for observation, injection, and withdrawal wells, rights-of-way for pipelines to connect the wells, and surface rights for compression and other facilities for the storage operations.

26. If, however, the company cannot acquire all of the necessary property rights it seeks through negotiation and relies on its certificate to acquire property interests through exercise of eminent domain, the only property interests that the court may grant are those necessary for the project as authorized or certificated by the Commission.³⁰ When the Commission certifies a geological formation or a portion thereof as a jurisdictional storage facility, it would not be practicable or feasible for the rights to any native gas within the certificated boundaries of the storage area to be retained by any party other than the storage operator. Further, cushion gas is a jurisdictional asset necessary to support the operation of a storage facility.³¹

²⁹ NGA section 7(h).

³⁰ A Commission order granting a certificate generally states that the certificate authorizes the project “as described in the application,” subject to any modifications discussed in the order.

³¹ The Commission generally certifies a storage facility's maximum storage capacity, working gas capacity, and cushion gas capacity. Once established, the storage operator needs to seek NGA section 7(b) abandonment approval if it wants to reduce any of these certificated levels. Further, a storage operator needs certificate authority to acquire cushion gas and, therefore, abandonment authority to dispose of cushion gas. For example, in *Pan Gas Storage, LLC d/b/a Southwest Gas Storage Company (Southwest)*, 120 FERC ¶ 61,223 (2007), the Commission granted Southwest NGA section 7(b) abandonment approval to decrease one of its storage facility's certificated total storage capacity and certificated working gas capacity and NGA section 7(c) certificate authority to increase the storage facility's certificated cushion gas level and acquire gas to reach the new, higher certificated cushion gas level. See also *Panhandle Eastern Pipe Line Company (Panhandle)*, 85 FERC ¶ 61,328 (1998), authorizing Panhandle to abandon cushion gas.

27. If it becomes apparent, subsequent to establishing the certificated boundaries of a storage reservoir, that those boundaries do not adequately contain gas, including any native gas and injected gas, the Commission will weigh the interests at stake and either mandate changes in the manner in which the facility is operated to ensure storage volumes remain within the facility's certificated boundaries or expand the facility's certificated boundaries to ensure that stored gas will be adequately confined within the revised boundaries.³² Thus, in the pending certificate proceeding in Docket No. CP08-158-000 in which Williston seeks to enlarge the lateral and vertical boundaries of its Elk Basin Storage Reservoir, we will consider all the material evidence bearing on Williston's assertions that production operations are resulting in the extraction of cushion gas needed to support its certificated storage services – including native gas inside and outside the current certificated storage boundaries – and thereby interfering with Elk Basin's certificated services by diminishing the facility's pressure and forcing Williston to respond by injecting additional gas or boosting compression. However, we will not limit our consideration to the evidence regarding the effects of production activities on Williston's storage operations. Even if we find that Williston is correct in its assertions, the issues and arguments raised by the owners of other property interests will be considered and balanced in determining whether the public convenience and necessity require granting the additional certificate authority requested by Williston in the proceeding in Docket No. CP08-158-000.

28. Williston reasons that the Commission's regulatory reach should extend to Howell's production, because although production is excluded from the Commission's

³² After cushion gas – which may include native gas – has been acquired by a certificate holder, either through negotiation or by the exercise of eminent domain, the cushion gas may migrate beyond certificated storage boundaries due to geological features of the underground reservoir that fail to form an adequate non-penetration barrier, or changes that compromise the ability of the reservoir to adequately retain gas, *e.g.*, production activities that cause fractures, or operational practices that induce cushion gas to move beyond the facility's designated boundaries. If a facility operator can prove that oil or gas producers are extracting storage gas from inside or outside of a storage facility's certificated boundaries, disputed issues of compensation due to the storage operator must be resolved by the courts. In situations where storage gas has migrated beyond a facility's certificated boundaries, the Commission can entertain applications for certificate authority to expand the facility's boundaries and acquire other property rights, such as rights to existing production wells and rights to oil and gas production, to prevent further production activities from capturing storage gas. In such situations, the Commission may implement gas recovery systems, such as converting production wells to be used to recover migrated storage gas and re-inject the recovered volumes to support the operations of the storage facility.

jurisdiction under NGA section 1(b), the jurisdictional status of cushion gas permits the Commission to assert authority over the terms of its sale, including prohibiting that sale.³³ What action, if any, is merited in response to such production is under review, and will be resolved in the pending certificate proceeding in Docket No. CP08-158-000, in which Williston seeks to enlarge the lateral and vertical boundaries of its Elk Basin facility. If we find in that proceeding, after balancing all competing interests, that the public convenience and necessity require granting additional certificate authority for Williston to expand its certificated storage boundaries to gain control of any existing wells or rights to production volumes to ensure that its storage gas is not extracted and sold, we will seek to limit such certificate authority so that production can continue to the extent feasible without compromising the integrity of Williston's storage operations.

29. We find that Williston's existing certificate authorization confers upon it the option of invoking eminent domain to secure the right to gas necessary to maintain pressures to enable Elk Basin to meet its certificated service obligations. However, the reach of Williston's existing authority is restricted to gas located within the existing boundaries of its storage reservoir. With respect to the "map rule" cases, we concur with both Howell and Williston in that there is no question that a certificate holder cannot rely on its certificate authorization to acquire, through the exercise of eminent domain, rights to land or other property that lie beyond the bounds of a project as specified in the project authorization order absent an amendment to the existing certificate. Thus, as the Ninth Circuit has stated, "a natural gas company may not condemn additional property that is

³³ Williston views producers' extraction of cushion gas that is outside Williston's certificated gas storage boundaries but is supporting its storage operations as the functional equivalent of involuntary – and unauthorized – abandonment by Williston, equating the withdrawal of cushion gas to removing a component of a certificated facility. We find that this argument is an inappropriate extrapolation from the language in NGA section 7(b) requiring that a natural gas company obtain abandonment authority from the Commission before abandoning any jurisdictional service or any facility being used to provide a jurisdictional service. Even assuming that gas outside Williston's certificated storage boundaries is jurisdictional because it is presently functioning as cushion gas for Williston's storage facility and services, a producer's extraction of such gas cannot be viewed as an unauthorized abandonment by Williston. Williston has taken no action to cause the withdrawal of such gas and certainly is not acquiescing in the withdrawal of the gas. Indeed, Williston has initiated both this proceeding and its certificate proceeding in Docket No. CP08-158-000 to ensure that the extraction of gas essential to the operation of its storage facility does not adversely affect its ability to meet its certificated storage service obligations. Under the circumstances, we do not see section 7(b) being implicated.

not specifically described in its existing [certificate of public convenience and necessity], even if the natural gas company seeks to acquire such property in order to operate and maintain an existing storage facility.”³⁴

30. Because Williston believes that the currently certificated boundaries of its Elk Basin storage facility do not fully contain all of the gas that functions as cushion gas to support its storage operations, Williston is seeking in its certificate proceeding in Docket No. CP08-158-000 to enlarge the horizontal and vertical boundaries of the certificated formation that constitutes the Elk Basin storage reservoir. Whether or not we grant Williston additional certificate authority to permit this expansion will depend largely on matters of fact regarding the geology of the storage reservoir and the areas around it and an analysis of samples of gas being produced in the vicinity. Therefore, we believe the pending certificate proceeding is the proper place to examine facts and circumstances specific to the operation of the Elk Basin facility.

31. In its petition in this proceeding, Williston does not ask us to enlarge its storage facility’s certificated boundaries, but asks us to address the issue of whether our jurisdiction over interstate gas service enables us to exert control over wells beyond Elk Basin’s currently certificated storage boundaries that are allegedly extracting cushion gas that helps support Williston’s jurisdictional storage services. Williston states that, with respect to gas in the ground, Wyoming follows a law of capture,³⁵ which precludes the ownership of native gas and may void a property claim to injected gas that has migrated beyond the certificated boundaries of an underground reservoir.³⁶ To date, in Montana, Wyoming, and federal court proceedings, Williston has been unsuccessful in obtaining damages from producers – via condemnation, conversion, and trespass claims –for the gas they have extracted. Because the gas at issue in those court decisions was presumably drawn from areas outside the currently certificated boundaries of Williston’s Elk Basin storage facility, we delve no further into those circumstances.³⁷

32. We concur with Williston’s assessment that certification of a storage facility conveys to the certificate holder the right to acquire native gas within the certificated

³⁴ *Williston v. An Exclusive Gas Storage Leasehold*, 524 F.3d at 1099.

³⁵ *See Torgeson v. Connelly*, 348 P.2d 63, 68 (Wyo. 1959).

³⁶ Montana subscribes to the ownership-in-place theory; equating gas ownership rights with those of mineral ownership. *See Homestake Exploration Corporation v. Schoregge*, 264 P. 388, 390-91 (Mont. 1928). Title or lease to land in Montana affords the surface-rights holder ownership to underlying minerals, oil, and gas.

³⁷ *See supra*, n. 11.

boundaries of the storage facility,³⁸ regardless of whether the native gas will be used as cushion gas, since it is not feasible, as discussed above, to allow a third party to retain rights to native gas in a storage formation that has been certificated as a storage facility. Therefore, we also concur with Williston that a state law that would preclude the certificate holder from acquiring the right to such native gas would be preempted by the Commission's NGA jurisdiction pursuant to the Supremacy Clause of the Constitution.³⁹ We will determine in Docket No. CP09-158-000 whether the public convenience and necessity require granting Williston the authority it is requesting in that proceeding to enlarge Elk Basin's certificated boundaries.

The Commission orders:

(A) Williston's petition for a declaratory order is granted in part and denied in part as discussed in the body of the order.

(B) The protests are granted in part and denied in part as discussed in the body of the order.

(C) Encore's request for a full evidentiary hearing is denied.

(D) E.E. Lonabaugh's late-filed comments are rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁸ Certificate authorization renders cushion gas for storage operations, including native gas used as cushion gas, subject to the Commission's jurisdiction over gas transported in interstate commerce. *See, e.g., Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 537 (1988).

³⁹ Article VI, clause 2. The NGA "preempts state and local law to the extent the enforcement of such laws or regulations would conflict with the Commission's exercise of its jurisdiction under the federal statute." *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094, at 61,360 (1992).